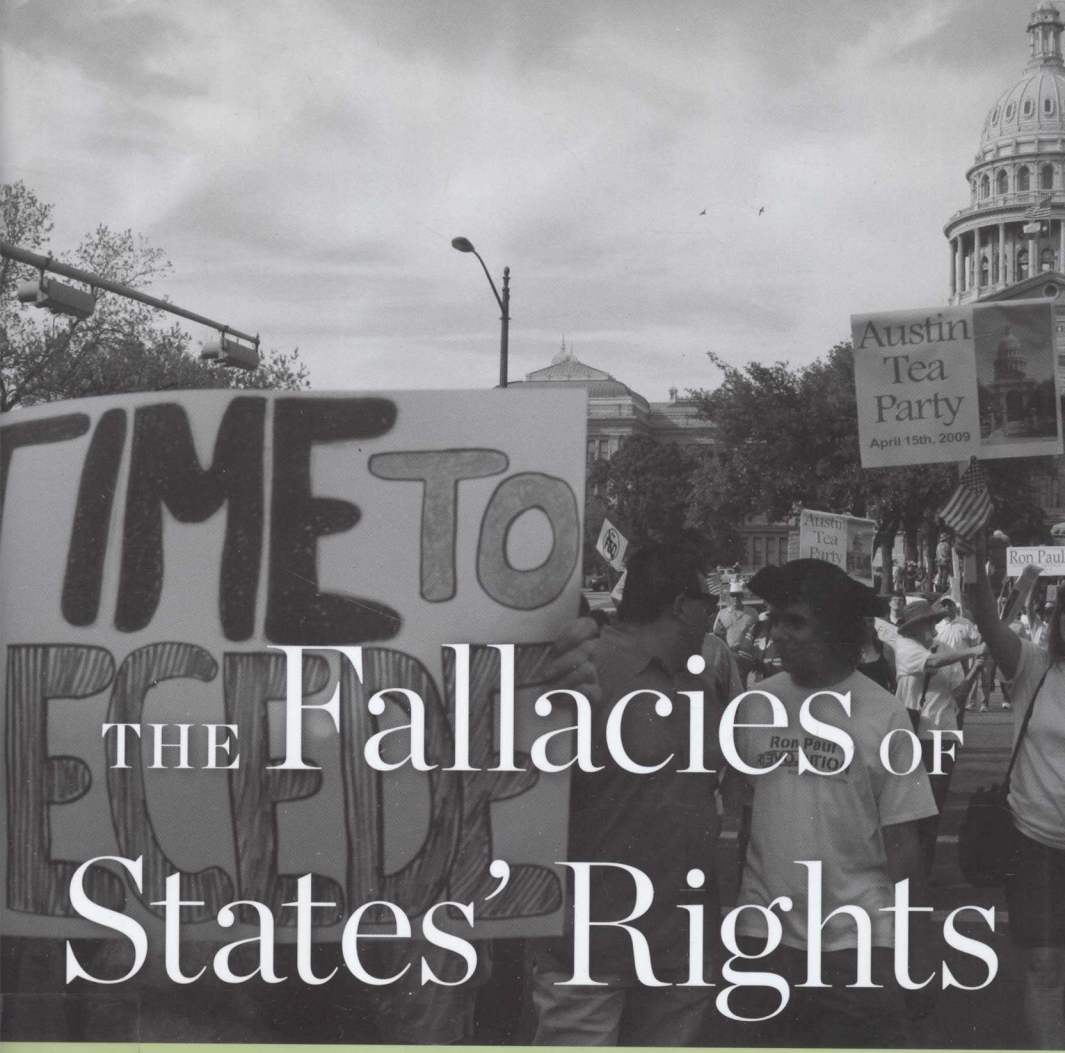

THE Fallacies OF States' Rights

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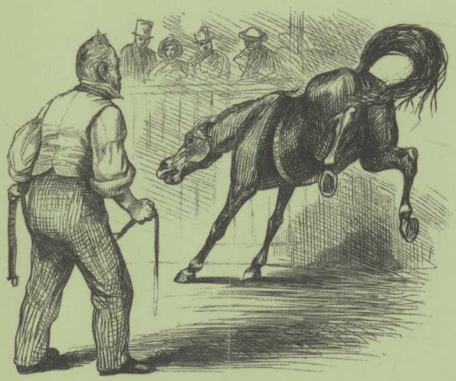

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For Karen

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INTRODUCTION: AMERICA'S OLDEST CONSTITUTIONAL DEBATE

The states' rights debate is America's oldest constitutional debate. Every issue in the campaign to ratify the Constitution was connected to the question of the future of the states in the proposed federal union. Resistance to national power in the name of states' rights brought the nation close to civil war on two occasions before firing started on Fort Sumter in 1861. Fearing that the Civil War Amendments to the Constitution would "fetter and degrade the State governments," the Supreme Court nullified all but the amendments' minimal promise for generations after the war. The scope of national power relative to the states was a major part of the conflicts of the Progressive Era and the New Deal. Expressing concern for the states' traditional control of the public schools, the Supreme Court abandoned the promise of equal educational opportunity less than two decades after the desegregation decision in 1954. Claims of "states' rights" have played an important role in opposition to the Court's decisions on school prayer, the treatment of criminal defendants, abortion, and gay rights. "States' rights" was a battle cry of the strategy that transformed the Republican Party from the party of Lincoln to the party of Reagan. A dramatic if limited return to states' rights was the signature achievement of the Rehnquist Court. At this writing states' rights is the battle cry against the Patient Protection and Affordable Care Act of 2010 ("Obamacare"). And though it has no real connection to states' rights, something called "competitive federalism" is part of the present campaign of corporate forces to deregulate the nation's economic life.

Yet in most of these cases observers could wonder whether states' rights was the most important issue. Did Thomas Jefferson and Alexander Hamilton disagree mostly over states rights or over the merits of an urban-industrial order? Was the Civil War fought for states' rights or for slavery?

Do pro-life forces oppose *Roe v. Wade* for taking an issue from the states or for legalizing abortion? Are opponents of the federal minimum wage indifferent to state minimum wages? Would critics of "Obamacare" remain silent if the states enacted similar measures? Behind these questions is a larger question of whether anything general can be said about what is really at stake in the federalism debate. If there is a bigger issue behind the federalism debate, what might it be? And if the federalism debate is a mask or a proxy for other issues, is anyone really interested in federalism or states' rights?

Whatever the American Constitution says about federalism it says indirectly. "Federalism" does not appear in the text of the Constitution, and though the document does refer to "the States," "the several States," and, of course, "the United States," *federalism* refers not to the mere existence of the states but to a relationship between the state governments and the national government. The closest the Constitution comes to describing this relationship is the Supremacy Clause of Article VI, which I shall discuss momentarily, and the Tenth Amendment. This amendment concerns "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States"; these powers are "reserved to the States respectively, or to the People." Americans tend to read this language as apportioning responsibilities between two spheres of government, not unlike parents parceling duties between their children. The task of courts in federalism cases is usually described as drawing the line between the powers of the nation and of the states—drawing the line to maintain "the federal balance" intended by the founding fathers.[1]

This widespread view of American federalism is a mistake. The Constitution does not divide responsibilities between levels of government; it does not say, for example, that interstate commerce belongs to Congress, and education belongs to the states. With a few exceptions, like the limited powers to set voter qualifications and name members of the Electoral College, the Constitution delegates power only to one government. It delegates powers to Congress while *reserving* other powers to the states, reserving them without naming them. Delegating some and reserving other powers may seem little different from parceling powers between two governments. But the difference is a big one, and judges who deny the difference, including a majority of the present Supreme Court, are taking chances with the nation's future.

Should We Value Federalism?

Federalism is a relationship between layers of government, and, appropriately, the correct understanding of federalism is a layered problem. As one approaches the bottom layer one talks less about constitutional law than about ideas like reason, action, the nature of values like justice, and how Americans see themselves—whether they now see themselves or ever saw themselves as Americans or as New Yorkers, for example, or as both. But since federalism is most immediately a legal concept, our inquiry should begin with the Constitution, which begins with a preamble. The Preamble refers to "We the People of the United States," an entity that aspires "to form a more perfect Union." Beyond this reference to "Union," the Preamble lists substantive goods—good things, like "the common defence," "the general Welfare," and "the Blessings of Liberty." Much will be said about these preambular words and phrases in this book, and I start with a matter of the utmost importance: the Preamble does not describe governmental institutions; it describes desirable social states of affairs. True, "Union" could refer to a political institution (an electorate or a citizenry) as well as a condition of society (how people see themselves in relation to others). But with the possible exception of "Union," the Preamble mentions no ideas relating to the arrangement of governmental offices and powers. "Federalism," "separation of powers," "democracy"—no such term appears in the Preamble. The Preamble therefore suggests that the mere maintenance of constitutional institutions, including federalism, is not an end for which the Constitution was established.[2]

A neglected passage of *The Federalist* tells why this might be so. In No. 45 James Madison says that "the public good, the real welfare of the great body of the people is the supreme object to be pursued; and . . . no form of government whatever, has any other value, than as it may be fitted for the attainment of this object." This is the message of the American Revolution, Madison claims, and he applies it even to the constitution whose ratification he is arguing for. "Were the plan of the [Constitutional] Convention adverse to the public happiness," he says, "my voice would be, reject the plan. Were the Union itself inconsistent with the public happiness, it would be, abolish the Union. In like manner as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, let the former be sacrificed to the latter."[3]

This passage makes sense. Who would establish a government just to watch it operate? Democracies, federal systems, and systems that separate powers may be thought essential to self government, which is a good thing. But federated democracies that separate powers have been known to offend the principles of self government and erode its social and economic preconditions. Though representative governments with separated powers at both the state and national levels ruled the nation for almost a century prior to the Civil War, slavery flourished during that period. And under the Articles of Confederation, populist opposition to taxes threatened national defense by leaving the Revolutionary War debt unpaid, while populist economic policies in the states undermined the confidence of investors and threatened the developing national market. Federalism and separated powers did nothing to relieve these problems. Citizens value the separation of powers and other institutional forms, of course, but they do so assuming that they will secure goods like liberty, fairness, security, and plenty. Madison's view of the ends of government is just common sense. By emphasizing substantive goods as the ends of government, the Preamble manifests this commonsense view of the relationship between substantive goods and governmental institutions: the latter are means to the former; constitutional government is chiefly a means for pursuing good things. Thinking about constitutional questions should therefore follow the ordinary ways people think about pursuing good things. These ordinary ways of thought make up the patterns and principles of practical reason.

Common Sense, States Rights, and the True Constitutional Federalism

If constitutional thinking were governed by practical reason, constitutional power would appear to be a good thing, as it does in the first paper of *The Federalist*, where Alexander Hamilton claims, surprisingly to the modern ear, that liberty and strong government are on the same side.[4] Constitutional power would seem a good thing because it authorizes the pursuit of good things. Congress's power "To coin money [and] regulate the Value thereof" is a good thing because it authorizes the pursuit of a useful and stable currency. Where constitutional thinking reflects ordinary practical reason, grants of constitutional power are grants of discretion, not restraints on discretion, for there is no telling what means might be necessary to secure a stable currency and other ends of constitutional

power. People who see constitutional institutions and powers as means to good things will appreciate what Alexander Hamilton calls two "axioms as simple as they are universal": that "*means* ought to be proportional" to ends, and that "persons, from whose agency the attainment of any *end* is to be expected, ought to possess the *means* by which it is to be attained" (23:147, 149).

Adding these axioms to other propositions, we can see that limiting the powers of the national government in behalf of the states makes little practical sense. The first of these other propositions is that it is impossible to predict what problems the nation will face—impossible to predict "the extent and variety of national exigencies," as Hamilton puts it in *The Federalist* (23:149). The second, more controversial, proposition is that national ends are more important than conflicting state ends—more important as a matter of constitutional logic, and more important to "the People of the United States."

That some ends are more important than others is implicit in the Supremacy Clause of Article VI, which provides that "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The Supremacy Clause thus requires that when powers conflict, national powers override state powers. And since powers are granted to pursue certain ends, "superior powers" implies "superior ends." If, for example, the Constitution makes the national government responsible for promoting the security and prosperity of all the American people (as I argue in Chapter 2), the Supremacy Clause implies that the Constitution favors national security and prosperity over any potentially conflicting ends whose pursuit is reserved to the states. An observer who sees the Constitution chiefly as a means to ends will thus conclude with Chief Justice John Marshall, the nation's most celebrated jurist, that the big question in clashes of state and federal power is not locating the line that will maintain some "federal balance." The big question is whether the national government is doing what it is supposed to do. If the national government is trying to secure the nation from foreign attack, or trying to promote job growth, or trying to ensure equal treatment and opportunity for the nation's people—if the government is pursuing ends that a reasonable reading of the Constitution authorizes—then clashes with the states are constitutionally irrelevant.

Consider some examples. If Congress were concerned with the impact of drunk teenage drivers on the price of auto insurance, someone who thought about constitutional questions the way Marshall did would let Congress withhold federal highway subsidies from states that failed to set the drinking age at twenty-one. Indeed, a Marshallian would agree that Congress could enact a national drinking age of twenty-one if that seemed a reasonable way to lower insurance rates. True, a national drinking age would displace fifty policies in an area that the states have historically regulated. But the Constitution says neither that the states alone shall set the drinking age nor that Congress shall never interfere in areas that the states have historically controlled. Another example would be a congressional mandate that Americans purchase private health insurance. If this mandate addressed a national economic problem, in a reasonable way, and if the states could impose such a mandate because it offended no personal "liberty to contract" or other protected individual right, Congress could enact it. In both of these examples Congress would be doing what it is supposed to do—promoting national prosperity—and when Congress is doing what it is supposed to do, clashes with the states are irrelevant. This is "Marshallian federalism"—state-federal relations in the manner that Marshall thought about them—and I claim that Marshallian federalism, not states' rights federalism, is the true constitutional federalism.

Proving this claim is a challenge, however, and a rather complex one. It requires more than citing the authority of John Marshall or any other historical figure. It also requires more than common sense about the relationship between means and ends and the need for discretion in changing circumstances. Though Marshallian federalism does have constitutional language and common sense on its side, it faces serious objections of different kinds from different political directions. These objections could begin by challenging my right to the term "Marshallian federalism." The uncompromising nationalist view of federalism that I have sketched above derives from *McCulloch v. Maryland*, an 1819 Supreme Court case widely regarded as John Marshall's most carefully reasoned opinion. But Marshall said things elsewhere that clash with what he said in *McCulloch*. So taking *McCulloch* as the authoritative statement of Marshall's position will invite objections. I might have avoided this difficulty by choosing another name, like "national federalism." But we shall see that Marshallian federalism is but one form of national federalism. I have elected "Marshallian federalism" for reasons connected to general principles of constitutional

interpretation. Since this book is on federalism, I keep principles of interpretation in the background. But I can sketch the reasons for my choice of names and refer readers elsewhere for the elaboration of those reasons.[5]

A law cannot guide conduct—cannot function as a law—if its message is mixed. You can't tell someone to stand up and sit down at the same time. Readers who take a writer (like Marshall) to speak for the law must therefore shape his inconsistencies to fit his principal thrust. This prescription applies to any legal authority, including the sovereign people for whom the Constitution speaks. Madison makes the point in No. 40 of *The Federalist*. Here he invokes a "rule[ ] of construction dictated by plain reason," that "every part of . . . [a legal] expression ought, if possible, to be allowed some meaning, and be made to conspire to some common end" (40:259–260). I shall follow this rule when discussing Marshall's opinions in cases other than *McCulloch*, and readers can decide for themselves whether I am entitled to use Marshall's name as I do. I use Marshall's name and rely on his argument in *McCulloch* to underscore a point: there is nothing novel or "ahistorical" about the theory of federalism I defend in this book. It fits comfortably within a reasonable interpretation of the American founding, and it enjoys the decisive advantage of being the only view of our subject that makes sense.

Limited Government in What Sense?

Marshall's critics have claimed from the beginning and still claim that *McCulloch* abandons the idea of limited national power, and on one view of what "limited power" means Marshall's critics are right. Readers can see this from my example of a national drinking age. A government can be limited in several ways, however. It can have a limited number of aims. It can be limited by the procedures through which it pursues its aims. And it can be limited in the means it may choose. The Constitution limits the national government in all these ways. The Preamble and the enumeration of powers in Article I and elsewhere indicate limited aims. Congress can regulate commerce, coin money, and declare war; there is no mention of power to promote highway safety, literacy, childbirth (as opposed to abortion), or sexual morality. Provisions for lawmaking, elections, appointments, and amendments limit the ways the government pursues its aims. And the constitutional rights of individuals prohibit some means to those aims. Congress would violate these three kinds of limits simultaneously if it authorized the Southern Baptist Convention to decide whether the

United States should be a Christian commonwealth. The federalism debate is not simply a debate over "limited government," therefore, for the national government would remain limited in important ways even if there were no states. The federalism debate is a debate about specific kinds of limits, namely (1) whether the national government should conceive its ends narrowly, to minimize conflict with the states, and (2) whether the powers of the states constitute limits on the means available to the nation when it is pursuing its authorized aims.

The debate over these two questions (the breadth of national ends and limits on national means in behalf of the states) is a debate between three versions of American federalism: Marshallian federalism, states' rights federalism, and process federalism. Marshallian and states' rights federalism join in opposition to process federalism. Process federalism holds that beyond the constitutional rights of individuals and the procedures for electing public officials and making laws, the national government can do whatever it wants. Thus, a process federalist would say, were it not for the First Amendment Congress could establish a national religion even without explicit power to do so. Marshallian federalism and process federalism jointly oppose the claim of states' righters that the reserved powers of the states limit national power just as the First Amendment limits national power. States' righters claim, for example, that states' rights preclude a power in Congress to make people buy health insurance, just as the First Amendment precludes a power in Congress to establish a religion. Combining the above questions and answers, we get Figure 1.

Marshallian federalism thus shares a conclusion with each of its contenders while they disagree with each other across the board. To prove their case Marshallians would have to show that though the Constitution limits the national government to certain ends, the national government

Figure 1

Affirms limited national aims	Denies limited national aims	Claims states' rights against the nation	Denies states' rights against the nation
Marshallian federalism			Marshallian federalism
States' rights federalism	Process federalism	States' rights federalism	Process federalism

can disregard the states when it is pursuing those ends. The Marshallian argument against states' rights federalism can begin and almost end with a simple observation: states' righters need an argument. A states' rights reading of the Constitution is not unreasonable. At least before all the evidence is in, one can read both the Constitution and the American founding to allow a state to nullify (on its own or through the federal courts) an otherwise authorized congressional act. On occasion, after all, major American statesmen and constitutional theorists have read the Constitution just that way. This list includes Thomas Jefferson, James Madison, and John C. Calhoun. But few will contend (and none successfully) that, in reason and justice, there is no other way to read the Constitution. Neither Jefferson, nor Madison, nor Calhoun managed to be a consistent states' righter, as we shall see. They proved by example that the Constitution can be read in different ways. States' righters therefore need an argument; they need an argument why everyone should read the Constitution their way.

Because, in making the needed argument, states' righters will be addressing parties on all sides of the debate, they must appeal to some value that the whole nation, including nationalists, can accept as a reason for the states' rights interpretation of the Constitution. Such an appeal would invoke a good that both sides accepted and that would serve as a standard for the conduct of each. This standard would be applied by a representative of both sides, which, perforce, would be an agent of the nation as a whole. Yet the existence of a controlling national standard whose application rests with an agent of the nation is precisely what states' writers deny. So states' righters need an argument, yet the very forum in which they make the argument—a national forum—excludes the kind of argument they need.[6]

Consider an example. "Liberty" exemplifies the kind of standard that states' righters need; they would claim that their reading of the Constitution enhances liberty. This has been the principal states' rights reason throughout American history, especially since the Civil War discredited reasons flowing from the mutual obligations of contracting parties (discussed in Chapter 5). But liberty is not the same as particular opinions about liberty, and one cannot offer what one admits to be a mere version of liberty as a reason for the other party in a debate to change its mind. Let me be clear: The expectations of debating parties enable the states' righter to claim that "states' rights enhance liberty." But these same expectations exclude

the claim that "states' rights enhance John's conception of liberty" or "our Southern conception of liberty" or any particular conception of liberty. Claims of this last variety may be true—states' rights may well enhance John's conception or any other particular conception of liberty. But these claims cannot count as reasons for changing anyone's mind. That John values states' rights is no reason Jane should.

Yet in an actual debate, a particular person or faction will say "states' rights enhance liberty," and the other side will construe this claim in terms of what it believes to be the speaker's conception of liberty. If John C. Calhoun says "states' rights enhance liberty," the other side will construe his claim in light of his known theory that liberty requires race-based slavery. Calhoun will say "states' rights enhance liberty"; the other side will hear him say "slavery enhances liberty." So proposing in the course of a debate that "states' rights enhance liberty" implicitly commits the speaker to defend his view of liberty as the true understanding of liberty or the best understanding in light of the available evidence. He will have to do more than merely assert a personal, local, or historical view of liberty. He will have to defend his conception of liberty to an agent that represents both sides, which can only be an agent of the nation. Thus, as we shall see in Chapter 5, Calhoun did more than assert his conception of liberty or claim that states' rights enhance liberty. He tried to persuade the nation that the dominant view of liberty was wrong and that his view was right—that is, that liberty itself really necessitated slavery. And the reason he did this lay in the usual understanding of what counts as a reason in any debate, including debate in a national forum.

To see how ordinary expectations of practical reason defeat states' rights, assume a national debate about the virtues of a racially integrated society. Imagine a states' righter proposing that liberty is served best if each state answers the race question its way and each individual resides where he or she pleases. Our states' righter would thus conceive of liberty as freedom of racial association. Suppose he persuades Congress and the Supreme Court about the meaning of liberty. Put aside all complicating questions and factors, like competing values, the composition of the government and the armed forces, the policies governing federal enclaves and territories, and whether attitudes would remain sufficiently diverse to ensure adequate populations for the different kinds of states. Assume only two races, "black" and "white," and that each American belongs to one or the other,

with no problem telling people apart. Each American would then have a choice of residence among three of four options: states that exclude whites, states that exclude blacks, mixed but segregated states, and integrated states. Our states' righter thinks that this situation enhances the liberty of individual Americans, and we accept this position for argument's sake.

This position would give no state a right to nullify or obstruct the nation's decision, taken in liberty's name, to divide itself into four groups of states. Since this decision would entail a nationally guaranteed right of every individual to relocate to one of three kinds of states, no state could deny its citizens a right to emigrate or prospective citizens of the appropriate colors a right to immigrate. Nor could any group of states decide to change its character. If the segregated states became integrated, the options of segregationists would be diminished in number, which would mean less liberty, an impermissible result in liberty's name. If integrated states became segregated, individuals who sought associations across racial lines would lose their freedom of association altogether, another result that liberty would not allow. And since states might want to change their character, security for liberty would require the nation to ensure that they did not do so. The value that justified states' rights would thus restrain the states. This is why defending states' rights is a self-defeating enterprise.

One Nation or Many?

Marshallians will also have to contend with the states' rights view of who or what made the Constitution. Did the framers speak for one national community, thirteen separate political communities that were determined to stay that way, or something in between? Readers might think that the Civil War settled this issue, and it did to some extent. But the war failed to silence talk of "state sovereignty," "nullification," and even "secession." Three generations after the war, segregationist states could still threaten to nullify the Supreme Court's decision in *Brown v. Board of Education* (1954). For ten years starting in 1995, states' righters on the Rehnquist Court struck down numerous national laws in their campaign to restore the "separate and independent existence" of the states as "sovereign" entities. At this writing somewhere between three and five members of the Roberts Court, all Republicans, see continuing constitutional relevance to a position rejected by the founder of their party: that the Constitution was founded by an act of thirteen separate peoples, "not the . . . people of